FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2429

[Docket Number: 0-MC-33]

Miscellaneous and General Requirements

AGENCY: Federal Labor Relations Authority.

ACTION: Proposed rule and proposed rescission of general statement of policy or guidance and request for comments.

SUMMARY: The Federal Labor Relations Authority (FLRA or Authority) seeks public comments on a proposed revision to its regulations and a proposed rescission of its general statement of policy or guidance (policy statement) in *Office of Personnel Management* (*OPM*), 71 FLRA 571 (2020) (Member Abbott concurring; then-Member DuBester dissenting). The proposed revision and rescission concern the intervals at which Federal employees may revoke their voluntary, written assignments of payroll deductions for the payment of regular and periodic dues allotted to their exclusive representative. Specifically, in addition to rescinding *OPM*, the Authority proposes either revising its regulation entitled "Revocation of Assignments" to provide that dues revocations may be processed only at one-year intervals, or, alternatively, rescinding that regulation in its entirety. The Authority seeks comments on these proposals.

DATES: To be considered, comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may send comments, which must include the caption "Miscellaneous and General Requirements," by one of the following methods:

- E-mail: FedRegComments@flra.gov. Include "FLRA Docket No. 0-MC-33" in the subject line of the message.

- Mail: Brandon Bradley, Chief, Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424-0001.

Instructions: Do not mail written comments if they have been submitted via email. Interested persons who mail written comments must submit an original and 4 copies of each written comment, with any enclosures, on 8½ x 11 inch paper. Do not deliver comments by hand.

FOR FURTHER INFORMATION CONTACT: Brandon Bradley, Chief, Case Intake and Publication at bbradley@flra.gov or at: (771) 444-5809.

SUPPLEMENTARY INFORMATION: In Case Number 0-MC-33, the National Treasury Employees Union (NTEU) has filed a petition, under § 2429.28 of the Authority's regulations, 5 CFR 2429.28, to amend § 2429.19 of those regulations, 5 CFR 2429.19. For the following reasons, the Authority hereby grants NTEU's petition and proposes to: (1) rescind the policy statement that the Authority issued in *OPM*, 71 FLRA 571; and (2) amend 5 CFR 2429.19 to clarify that, once an employee has given an agency a voluntary, written assignment authorizing payroll deduction of regular and periodic dues for the employee's exclusive representative (voluntary dues assignment), the employee may thereafter revoke that assignment only at yearly intervals, or, in the alternative, rescind § 2429.19 in its entirety.

Section 7115(a) of the Statute provides, in pertinent part, that voluntary dues assignments "may not be revoked for a period of 1 year." 5 U.S.C. 7115(a). In its earliest years, in *U.S. Army, U.S. Army Materiel Development and Readiness Command, Warren, Michigan* (*Army*), 7 FLRA 194 (1981), *recons. denied*, 8 FLRA 806 (1982), the Authority unanimously concluded that Section 7115(a) allows employees to revoke voluntary dues assignments only at one-year intervals. *See id.* at 199. The Authority

based this conclusion on a detailed assessment of Section 7115(a)'s wording and legislative history, along with the Statute's overall purposes. *See id.* at 196-99.

The Authority applied this interpretation of Section 7115(a) for nearly four decades. *See United Power Trades Org.*, 62 FLRA 493, 495 (2008); *AFGE, AFL-CIO*, 51 FLRA 1427, 1433 n.5 (1996); *NAGE, SEIU, AFL-CIO*, 40 FLRA 657, 688-89 (1991); *AFGE, AFL-CIO, Dep't of Educ. Council of AFGE Locs.*, 34 FLRA 1078, 1080-82 (1990); *AFGE, AFL-CIO, Loc. 1931*, 32 FLRA 1023, 1029 (1988); *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 19 FLRA 586, 589 (1985); *Veterans Admin., Lakeside Med. Ctr., Chi., Ill.*, 12 FLRA 244, 246 (1983); *Dep't of HHS, SSA, Off. of Program Serv. Ctrs. & Ne. Program Serv. Ctr.*, 11 FLRA 618, 620 (1983); *Dep't of HHS, SSA, Bureau of Field Operations (N.Y.C., N.Y.)*, 11 FLRA 600, 602-03, *recons. denied*, 12 FLRA 754 (1983).

Then, in 2020, a majority of the Authority's Members issued the policy statement in *OPM*, 71 FLRA 571. The majority rejected the FLRA's prior, longstanding interpretation of Section 7115(a) and, instead, found that the "most reasonable way to interpret" Section 7115(a) was to find that it addressed revocations of voluntary dues assignments only during the first year of an assignment – and that, after the first year, employees should be permitted to revoke their voluntary dues assignments at any time. *Id.* at 572-73. In so finding, the majority stated, among other things, that, "[e]xcept for the limiting conditions in [Section] 7115(b), which [Section] 7115(a) explicitly acknowledges, nothing in the text of [Section] 7115(a) expressly addresses the revocation of dues assignments after the first year." *Id.* at 572. At the same time, however, the majority declined to consider the legislative history that the Authority had discussed at length in *Army*, on the ground that Section 7115(a)'s pertinent wording "is not ambiguous." *Id.* at 573 n.23.

Then-Member DuBester dissented. *See id.* at 576-79.

Subsequently, on March 19, 2020, the majority, with then-Member DuBester again dissenting, published a notice of proposed rulemaking in the *Federal Register*. 85 FR 15742 (March 19, 2020). On July 9, 2020, the majority—again, with then-Member DuBester dissenting—issued a final rule, with an effective date of August 10, 2020. 85 FR 41169 (July 9, 2020). That final rule, set forth at 5 CFR 2429.19, states that an employee may initiate the revocation of a dues assignment pursuant to 5 U.S.C. 7115(a) at any time after the expiration of an initial one-year period following the dues assignment.

On April 1, 2022, NTEU filed the above-mentioned petition for rulemaking (rulemaking petition), arguing that the Authority should amend § 2429.19 to provide for dues revocations only at one-year intervals. Rulemaking Pet. at 9. NTEU asserts that Section 7115(a) of the Statute requires the Authority to return to the rule that *Army* established. *Id.* at 3. NTEU contends that, although Section 7115(a)'s wording does not address dues revocations after the initial one-year period, its legislative history establishes that Congress intended to allow such revocations only at one-year intervals. *Id.* (citing *Army*, 7 FLRA at 198-99). According to NTEU: before the Statute was enacted, dues revocations could occur only at six-month intervals, *id.* at 4 (citing Labor-Management Relations in the Federal Service, E.O. No. 11,491, § 21, 34 FR 17605, 17614 (Oct. 31, 1969)); and, by passing the Statute, "Congress unquestionably intended to strengthen the position of federal unions," *id.* (citing *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983)). Contrary to that intent, NTEU claims, current § 2429.19 provides federal-sector unions "with less stability and fewer collective-bargaining rights" than they had before the Statute's enactment. *Id.* In particular, NTEU claims that, under current § 2429.19, unions no longer have the right to regular dues-revocation intervals – and cannot even *bargain* over such intervals. *Id.* at

4-5. NTEU claims that the Authority has not explained the "basic contradiction" between current § 2429.19 and Congress's intent. *Id.* at 4.

In addition, NTEU argues that, for three reasons, its proposed regulatory revision would be "good, reasonable policy." *Id.* at 5.

First, NTEU argues that doing so would restore financial security and predictability for unions. *Id.* NTEU asserts that, for those NTEU bargaining units that are not yet subject to current § 2429.19, NTEU can: plan its fiscal-year budget because it can know, with a reasonable degree of certainty, how much dues revenue will be available; process revocations all at once, which is more efficient than processing them one by throughout the year; and, consequently, concentrate more of its resources on collective bargaining and improving employees' working lives. *Id.* at 6. According to NTEU, agencies also would likely benefit from the efficiency of processing revocations once per year. *Id.*

Second, NTEU contends that revising current § 2429.19 to provide for dues revocation only at one-year intervals would restore unions' bargaining posture. *Id.* at 6. According to NTEU, since 1981, it has relied on *Army* when drafting and negotiating dues-withholding provisions. *Id.* However, when current § 2429.19 took effect, "suddenly those time-tested provisions became nonnegotiable." *Id.* Because federal-sector unions "have little to bargain over in the first place," NTEU contends that current § 2429.19 "diminish[es]" unions' role in collective bargaining. *Id.* (citing *NTEU v. Chertoff*, 452 F.3d 839, 853-54 (D.C. Cir. 2006)).

Third, NTEU argues that revising § 2429.19 would honor employee choice. *Id.* NTEU contends that allowing revocations only at one-year intervals would not infringe on employees' rights, under Section 7102 of the Statute, to refrain from joining or assisting a union. *Id.* (citing 85 FR 41171). NTEU notes that joining a union and paying dues by payroll deduction always has been an employee's choice, and that the Federal

Government's payroll-deduction form, Standard Form (SF) 1187, expressly states that "completing this form is voluntary" and tells employees when and how they may cancel their deductions. *Id.* According to NTEU, courts have held that: dues assignments are voluntary, binding contracts, *id.* at 7-8 (citing *Belgau v. Inslee*, 975 F.3d 940, 950-51 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021); *IAM Dist. 10 & Loc. Lodge 873 v. Allen*, 904 F.3d 490, 506 (7th Cir. 2018) (*IAM*), *cert. denied*, 139 S. Ct. 1599 (2019); *NLRB v. U.S. Postal Serv.*, 827 F.2d 548, 554 (9th Cir. 1987)); and requiring employees to honor those assignments until the next annual revocation period does not force them to join or assist a union, *id.* at 8 (citing *Belgau*, 975 F.3d at 950; *IAM*, 904 F.3d at 506 (quoting *SeaPak v. Indus., Tech., & Prof'l Emps., Div. of Nat'l Mar. Union, AFL-CIO v. W.R. & Grace Co.*, 300 F. Supp. 1197, 1201 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971)). Further, NTEU asserts that temporarily irrevocable payment authorizations are common and enforceable in other contexts. *Id.* (citing *IAM*, 904 F.3d at 506 (health-insurance-premium payroll deductions); *Fisk v. Inslee*, 759 Fed. Appx. 632, 634 (D. Or. 2019) (consumer contracts)).

Finally, NTEU argues that there has been "little reliance" on current § 2429.19 because (1) it has taken effect only for bargaining units whose collective-bargaining agreements were not in force on the rule's effective date of August 10, 2020, and (2) the U.S. Office of Personnel Management has not yet revised SF 1187, so even for units where current § 2429.19 applies, employees may not even be aware of it. *Id.* at 9. Consequently, NTEU claims, returning to the "[forty]-year status quo under *Army*" would be a "virtually seamless transition." *Id.*

In the Authority's view, NTEU's rulemaking petition raises several legal and policy reasons for rescinding the policy statement in *OPM*, which led to the promulgation of current § 2429.19, and for rescinding or amending § 2429.19 to return the Authority to its prior interpretation of Section 7115(a) of the Statute. Accordingly, the Authority

proposes to: (1) rescind the policy statement in *OPM*; and (2) revise current § 2429.19 to provide that dues revocations may be processed only at one-year intervals, or, in the alternative, rescind § 2429.19 in its entirety.

Thus, as noted above, the Authority hereby solicits comments on these proposals, including, but not limited to, comments addressing:

- Whether the proposals are consistent with the Statute (including Sections 7102 and 7115(a)) and administrative and judicial precedent (including *Council 214*, 835 F.2d 1458);
- The extent to which agencies have implemented current § 2429.19, and any positive and negative effects of such implementation;
- What rules should govern if the Authority rescinds, rather than amends, § 2429.19;
- Whether there are other alternatives that the Authority should consider, such as amending § 2429.19 to allow for an annual, one-month window period for revoking dues.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this proposed rule, as amended, will not have a significant impact on a substantial number of small entities, because this proposed rule applies only to Federal agencies, Federal employees, and labor organizations representing those employees.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is not subject to the requirements of Executive Order (E.O.) 13771 (82 FR 9339, Feb. 3, 2017) because it is related to agency organization, management, or personnel, and it is not a "significant regulatory action," as defined in Section 3(f) of E.O. 12866 (58 FR 51735, Sept. 30, 1993)

Executive Order 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 13132 (64 FR 43255, Aug. 4, 1999), this proposed rule does not have sufficient federalism implications to warrant preparation of a federalism assessment.

Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of E.O. 12988 (61 FR 4729, Feb. 5, 1996).

Unfunded Mandates Reform Act of 1995

This proposed rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq.

List of Subjects in 5 CFR Part 2429

Administrative practice and procedure, Government employees, Labor management relations.

For the reasons stated in the preamble, the FLRA proposes to amend 5 CFR part 2429 as follows:

PART 2429-MISCELLANEOUS AND GENERAL REQUIREMENTS

1. The authority citation for part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

Option 1

2a. Revise § 2429.19 to read as follows:

§ 2429.19 Revocation of assignments.

Authorized dues assignments under 5 U.S.C. 7115(b) may be revoked only at intervals of one year.

Option 2

§ 2429.19 [Removed]

2b. Remove § 2429.19.

Approved: December 14, 2022.

Rebecca Osborne,

Federal Register Liaison,

Federal Labor Relations Authority.

Note: The following will not appear in the Code of Federal Regulations

Member Kiko, dissenting:

It is unsurprising that the Petitioner would seek to reinstate a rule making it more onerous for employees to revoke dues-withdrawal authorization. What is surprising, though, is that the majority indulges the Petitioner by commencing this premature, unnecessary notice-and-comment rulemaking. When the Authority very recently solicited public comment on this regulation, we heard from employees who were frustrated with narrow form-submission windows occurring on indecipherable anniversary dates. In 2020, the Authority enacted a regulation that is consistent with the Federal Service Labor-Management Relations Statute (the Statute) and assures employees the fullest freedom in the exercise of their rights. Regrettably, the majority's proposed rulemaking would discard a valuable reform without affording it even a reasonable trial period. In addition to finding this enterprise premature and ill-advised, I write separately to express several other disagreements with the majority's formulation of the Notice.

Initially, I note that the petition for rulemaking did not request the rescission of *OPM*, 71 FLRA 571 (2020), so it is puzzling how the majority could propose rescinding that decision as the result of granting the petition. Further, I do not believe that an Authority decision can be rescinded through a process that is designed to make rules. If there is legal authority to support this unprecedented approach, then it is missing from the Notice. Notably, when the Authority promulgated the current version of 5 C.F.R. § 2429.19, it did not purport to "rescind" *U.S. Army, U.S. Army Materiel Development and Readiness Command, Warren, Michigan*, 7 FLRA 194 (1981), which set forth the Authority's previous interpretation of § 7115(a) of the Statute.

Disappointingly, the Notice fails to address the convenient flip-flopping of the Petitioner's position on the Authority's regulatory powers. Just a few years ago, the Petitioner asserted that the Authority lacked the power to issue a rule on this topic, but now the Petitioner insists that the Authority must exercise its rulemaking power in this area. *Compare* NTEU, Comment Letter on Proposed Rule Concerning Miscellaneous and General Requirements (Apr. 9, 2020) at 7 (stating that the Authority would "exceed its regulatory power" by issuing a rule to govern when employees may revoke a dues assignment), *with* Pet. at 1 (stating that the Petitioner's proposed rule "would make sound use of the Authority's rulemaking power").

Some of the Petitioner's other claims are equally confusing. For example, the Petitioner claims that very few agencies and unions have implemented § 2429.19 because their existing collective-bargaining agreements predate the regulation's promulgation. Pet. at 9. Yet the Petitioner also claims that the regulation is seriously harming unions. *Id.* at 4-7. These two claims are contradictory: If very few unions have been complying with the regulation, then the Petitioner must be exaggerating the scope of the regulation's alleged harm in order to support the petition. Consequently, the Petitioner ought to explain its contradictory claims on the Authority's regulatory powers and the alleged harms from the regulation.

Appropriately, the Notice solicits comments about whether the Petitioner's proposed rule is consistent with the U.S. Court of Appeals for the D.C. Circuit's decision that § 7115(a) of the Statute is designed *primarily for the benefit of employees, not unions*. *AFGE, Council 214, AFL-CIO v. FLRA*, 835 F.2d 1458, 1460-61 (D.C. Cir.

1987). The Petitioner clearly views § 7115(a) as a congressional gift to unions, but judicial precedent says otherwise. *Compare* Pet. at 3 (stating that "the purpose of [§]7115(a) was to create more financial stability and predictability for unions than before" the Statute was enacted), *with AFGE, Council 214*, 835 F.2d at 1460 (stating that § 7115(a) "was designed for the primary benefit and convenience of the employee"). The Petitioner offers three reasons why its proposed rule would be good policy, but none concerns a benefit to employees. According to the Petitioner, the proposed rule would "provide unions with financial security and predictability," Pet. at 5, "restore unions' status at the bargaining table," *id.* at 6, and "[h]onor[]" employees' choices by (ironically) restricting employees' choices, *id.* at 7. As such, the proposed rule's subjugation of employees' individual interests to federal unions' institutional interests appears to conflict with § 7115(a)'s animating purpose.

Moreover, if the majority must issue this premature Notice, then I am gratified that the Notice invites comments on whether there should be a one-month, government-wide revocation period for terminating authorizations of dues withholding. This idea comes from one of the more interesting arguments in the petition. Specifically, the Petitioner asserts that "the most apt analogy" to the system of dues-withholding revocation that the Petitioner desires is "health insurance premium payroll deductions." Pet. at 8. In that regard, the Petitioner notes that once federal employees select their health insurance, they generally must wait a year to change or cancel that insurance "during a one-month window period called open season." *Id.* In keeping with the Notice, I urge commenters to offer their views on whether to amend § 2429.19 so that employees have at least one full month each year – occurring at the same time for all federal employees – to decide whether to terminate dues withholding.

There are good reasons to explore a framework for dues-withholding revocation that resembles the federal open season for health insurance. Under the previous system of dues-withholding revocation, before § 2429.19 was adopted, most union members could revoke their dues assignments only during short window periods that preceded the anniversary dates of the members' union enrollments. In an attempt to ensure higher and more predictable dues revenues, most federal unions erected obstacles to revocations. Miscellaneous and General Requirements, 85 Fed. Reg. 41,169, 41,171 (July 9, 2020) (discussing barriers to dues-withholding revocations). The Petitioner's proposed rule would reauthorize such obstacles. Far from a highly advertised, month-long decision period like open season, most employees under the previous system had about two weeks to revoke their previously authorized dues withholdings. Moreover, revocation forms could be rejected if employees did not know their anniversary dates, or did not correctly calculate their unique window periods using contract wording that was indecipherable to most readers. Miscellaneous and General Requirements, 85 Fed. Reg. at 41,171 (providing, as an example, that a revocation form "must be submitted to the Union between the anniversary date of the effective date of the dues withholding and twenty-one (21) calendar days prior to the anniversary date"). Rather than seeking regulatory authorization to make revocations more difficult again, the Petitioner could ensure predictable revenues – and better serve employees – by offering quality benefits and services that convince union members of the value in continuing their dues payments.

Although the Notice necessarily requests comments on the implications of potentially rescinding § 2429.19 entirely, I wish that the majority had included in the Notice at least a glimpse of the potential consequences of this approach, in order to better focus any comments on this question. By mentioning rescission as little more than an afterthought, the Notice hampers commenters' abilities to offer thoughtful perspectives.

Therefore, I encourage commenters to offer fulsome assessments of the potential rescission scenario – in particular, how it would affect the Authority's ability to adjudicate future dues-revocation disputes.

Finally, for the sake of accuracy, I wish to emphasize that § 2429.19 had both an "effective date" and an "applicability date." Miscellaneous and General Requirements, 85 Fed. Reg. at 41,169. This distinction was critical to the Authority's conclusion that the rule applied only to the revocation of assignments that were authorized on or after August 10, 2020, and not to the revocation of assignments that were authorized before that date. *See* Office of the Federal Register, *Document Drafting Handbook*, Aug. 2018 Ed. (Rev. 1.4, dated Jan. 7, 2022) 3-9 to 3-10 (discussing the distinction between effective dates and applicability dates), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf.

I continue to strongly disagree that the Authority should expend valuable resources on this rulemaking. However, if commenters offer the benefit of their insights on the important matters that I have raised here, as well as the matters set forth in the Notice, then I hope that the majority will afford their perspectives the careful consideration that they deserve. I assure potential commenters that I will afford their views such consideration.

[FR Doc. 2022-27495 Filed: 12/20/2022 8:45 am; Publication Date: 12/21/2022]